

Honorable John C. Coughenour

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

OFFSHORE-INLAND SERVICES OF  
ALABAMA, INC.,

Plaintiff,

v.

R/V DEEPOCEAN QUEST (ex NADIR),  
IMO No. 7347823, *in rem*, OCEAN  
SERVICES, LLC, *in personam*, and  
CASEMO INTERNATIONAL, S.A.,

Defendants.

Case No.: C06-0183-JCC

*Consolidated with C06-1114-JCC*

**IN ADMIRALTY**

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

DEEP OCEAN QUEST, S.A., a foreign  
corporation,

Plaintiff,

v.

STABBERT MARITIME YACHT &  
SHIP LLC, a Washington limited liability  
company d/b/a Stabbert Maritime Yacht &  
Ship, Inc.; et al.

Defendants.

Plaintiff Deep Ocean Quest, S.A. ("DOQ") brought this action against Defendants  
Stabbert Maritime Yacht & Ship, Inc. ("SM, Inc."), Stabbert Maritime Yacht & Ship, LLC,

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 1**

No. 2:06-cv-00183-JCC

1 (“SM, LLC”), Ocean Services, LLC (“Ocean Services”), and Dan Stabbert and his marital  
2 community, for breach of a maritime contract to repair and refurbish a ship and for maritime  
3 torts. (Pretrial Order 1–2 (Dkt. No. 289).) DOQ asserted that SM, Inc., and SM, LLC, breached  
4 the parties’ Vessel Management Agreement (“VMA”) and warranty. (*Id.* at 2.) In addition, DOQ  
5 contended that Ocean Services breached an implied warranty and was liable in negligence. (*Id.*)  
6 Further, DOQ sought recovery against Dan Stabbert and his marital community, Ocean Services,  
7 and SM, LLC, under the alter ego doctrine and for disregarding corporate formalities. (*Id.*)  
8 Defendants pursued counterclaims against DOQ to recover amounts owed to SM, Inc./SM, LLC,  
9 under the Vessel Refurbishment/Repair Agreement (“VRRRA”); for amounts owed for the  
10 administration of a Hurricane Katrina insurance claim; for quantum meruit; for indemnity for  
11 defending a claim brought by subcontractor Offshore-Inland Services of Alabama, Inc.; and for  
12 costs, prejudgment interest, and attorneys’ fees. (*Id.* at 6; Defs.’ Tr. Br. 53–61 (Dkt. No. 258).)

13       After a bench trial conducted from February 18 through March 10, 2009, the Court  
14 instructed the parties to submit written closing arguments. The Court advised that thereafter, the  
15 Court would prepare a short order announcing its decision and directing the prevailing party to  
16 submit proposed findings of fact and conclusions of law. On April 21, 2009, the Court issued a  
17 ten-page Order announcing its decision as to each of the claims and counterclaims. (Dkt. No.  
18 333.) In that Order, the Court directed the substantially prevailing party, the Stabbert Defendants,  
19 to submit proposed findings of fact and conclusions of law consistent with the Court’s rulings  
20 therein. Defendants submitted their proposed findings of fact and conclusions of law on May 20,  
21 2009. (Dkt. No. 351.) The Court has carefully considered the proposed findings of fact and  
22 conclusions of law, the evidence submitted at trial, and the balance of pertinent materials in the  
23 record, and hereby enters the following Federal Rule of Civil Procedure 52(a) findings of fact  
24 and conclusions of law, which are based on Defendant’s proposed version and contain some  
25 modifications.

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 2**

No. 2:06-cv-00183-JCC

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18

## FINDINGS OF FACT

1. There are two consolidated actions. Plaintiff Offshore-Inland Services of Alabama, Inc., initiated Cause No. C06-0183-JCC by filing a complaint on February 6, 2006, *in rem* against the Research Vessel DEEP OCEAN QUEST (ex NADIR) and against Ocean Services, LLC, *in personam*. That case was consolidated with Cause No. C06-1114-JCC and later settled. An order of dismissal confirming the settlement was entered on January 5, 2009. (Dkt. 248.)

2. In the remaining action, Cause No. C06-1114-JCC, suit was commenced on August 8, 2006, by Plaintiff Deep Ocean Quest, SA (“DOQ”), a Panamanian company that owned the vessel DEEP OCEAN QUEST (now renamed ALUCIA) (the “Vessel”) against Stabbert Maritime Yacht & Ship, LLC; SMY&S, Inc. (“SM, Inc.”) (f/k/a Stabbert Maritime Yacht & Ship, Inc.); Ocean Services, LLC; Stabbert Maritime Holdings, LLC; Stabbert Maritime, LLC; Stabbert Yacht and Ship LLC; and Stabbert Yacht & Ship Holdings, LLC; all State of Washington companies. DOQ also joined as defendants the owners of the defendant companies, Dan Stabbert and his marital community. Causes C06-0183-JCC and C06-1114-JCC were consolidated on December 22, 2006. (Dkt. 33.)

3. Plaintiff DOQ is a citizen of a foreign state and does not have its principal place of business within the State of Washington. Defendants are corporations, individuals and limited liability companies of the State of Washington with their principal place of business in the State of Washington. The amount in controversy exceeds the sum specified by 28 U.S.C. § 1332. The action commenced by DOQ is based on a maritime contract relating to repair and refurbishment of a ship, and allegations of maritime torts, which constitute admiralty and maritime claims within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

25

## FINDINGS OF FACT AND CONCLUSIONS OF LAW - 3

1           4.       SM, Inc., (d/b/a Venture Pacific Marine, Inc.) and its affiliated company, Ocean  
2 Services, LLC, were experienced and successful in managing the refit and subsequent operation  
3 of a number of vessels prior to 2004. SM, Inc., specialized in yacht and research vessels, while  
4 Ocean Services specialized in commercial vessels. Their principal, Dan Stabbert (“Stabbert”),  
5 has considerable experience in this work and had developed a methodology by which vessels  
6 would be refitted with the vessel owner acting essentially as a general contractor and hiring  
7 skilled contractors and trades to perform the work.  
8

9           5.       SM, Inc., previously managed the conversion of a tug into a yacht named  
10 ASTERIA for a wealthy Swiss industrialist named Stephan Schmidheiny and managed the  
11 operation of that yacht for Schmidheiny for several years.

12           6.       In mid-2004, Stabbert received a call from Schmidheiny, who indicated that he  
13 was interested in investing in the vessel NADIR with Mike McDowell. McDowell is an  
14 Australian national who had been engaged in selling dive trips to the TITANIC and space  
15 adventures. The NADIR was a 30-year-old, 183-foot former French research vessel which had  
16 been laid up and decommissioned. McDowell had purchased the NADIR for approximately  
17 \$300,000 on or about August 9, 2004.  
18

19           7.       Schmidheiny and McDowell told Stabbert they were interested in Stabbert’s  
20 assistance in managing a refit of the NADIR in the United States. Stabbert traveled to Toulon,  
21 France, to inspect the vessel and the parties further discussed the scope of the anticipated project.  
22 Stabbert was asked to prepare an estimate of the cost of the refit and for advice as to how the  
23 project could be managed.

24           8.       McDowell and Schmidheiny each acquired a 50% interest in the Panamanian  
25 corporation Casemo Internacional, SA, through which McDowell had acquired ownership of the

1 Vessel. The company was later renamed Deep Ocean Explorations, SA, and then Deep Ocean  
2 Quest, SA (“DOQ”). McDowell’s interest in DOQ was acquired through his Utah limited  
3 liability company Deep Ocean Expeditions, LLC; Schmidheiny’s interest was acquired through  
4 his Fairmont Company, SA. Schmidheiny funded most of the project through his Crea Trust,  
5 which was managed by Christian Verling. DOQ elected Christian Verling, Silvia Gallo (an  
6 accountant), McDowell, Manuel Quintero (a Panamanian lawyer), Belinda Sawyer and Peter  
7 McDowell as its directors.  
8

9 9. Stabbert introduced Boris Kirilloff as a naval architect and Joe Artese as an  
10 interior designer to DOQ and asked Kirilloff to fly to France to inspect the vessel. Kirilloff was  
11 subsequently retained as project naval architect and Artese for the anticipated interior work.

12 10. SM, Inc., hired Rick Board as Captain on behalf of the vessel owners and the  
13 vessel departed France for the United States, where it was anticipated a refit would be  
14 accomplished. The parties contemplated the project would be accomplished in either Gulfport,  
15 Mississippi, or Seattle, Washington.

16 11. Stabbert initially recommended against the refit of the Vessel on grounds that it  
17 might be more costly than the ultimate benefit. Stabbert also recommended that if the Vessel be  
18 refurbished, the refurbishment be done in Seattle rather than Gulfport. Stabbert also  
19 recommended against appointing DOQ nominee Patrick Lahey as the vessel owner’s  
20 representative on grounds that he did not have the technical experience for such a role. DOQ  
21 rejected all of these recommendations and directed the vessel to Gulfport.  
22

23 12. During December 2004 and January 2005, DOQ and SM, Inc., negotiated a  
24 contract for the refit and management of the Vessel. Both parties were sophisticated and both had  
25 advice of counsel in the negotiations.

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 5**

1           13.     On January 2, 2005, prior to a contract being signed, Stabbert explained that  
2 because the refit project would involve thousands of items, he anticipated an owner's  
3 representative being available in Gulfport full-time to oversee and approve purchases.

4           14.     The Vessel arrived at Gulfport on or about December 30, 2004, and was moored  
5 at a leased quay. On January 7, 2005, SM, Inc., assisted DOQ in setting up a Mississippi  
6 company, DeepOcean, LLC, ("DOLLC") to comply with local workmen's compensation laws  
7 for personnel. SM, Inc., was appointed as manager, with DOQ as sole owner and member. DOQ  
8 had complete control of DOLLC. An office was set up on site in Gulfport for DOLLC  
9 administrative support, including Captain Board, who was appointed as DOLLC's project  
10 manager.  
11

12           15.     DOQ established an initial budget for the refit at \$3.8 million and McDowell  
13 directed that the project be completed in five months.

14           16.     DOQ and SM, Inc., entered into two contracts: a Vessel Management Agreement  
15 ("VMA") (Dkt. No. 258-2 at 2) and a Vessel Refurbishment/Repair Agreement ("VRRRA") (Dkt.  
16 No. 258-3 at 2). The contracts were integrated into a single agreement (the Contract).

17           17.     The VMA and the VRRRA were signed twice, the first time on or about January  
18 25, 2005, then again after February 25, 2005. The contract was made effective November 1,  
19 2004. Prior to signing, the contract had been reviewed by counsel for both parties.  
20

21 **A. The VMA Role Assigned to SM, Inc.**

22           The VMA somewhat paralleled the previous management contract for the yacht  
23 ASTERIA. The VMA is an agreement for delivering the Vessel from France to the United  
24 States, employing a crew, and managing, navigating and operating the vessel after refurbishment  
25 was complete. Paragraph 4 provides in pertinent part:

1 Manager shall at all times exercise the standard of care of a reasonably  
2 prudent vessel manager under similar circumstances, except that  
3 Manager may accept, act upon and/or implement approved instruction  
and/or direction from Owner without assuming further responsibility.

4 (VMA ¶ 4 (Dkt. No. 258-2 at 3).)

5 The VMA goes on to clearly spell out the duties of each party:

6 5. DUTIES OF MANAGER

7 Manager is granted authority to provide the following vessel  
8 management services on behalf of and as agent for Owner, excepting  
such matters as have been specifically allocated to Owner herein:

- 9 A. procuring and maintaining insurances . . . .
- 10 B. mobilizing the Vessel from its current location in France to the  
11 refurbishment port/place selected by Owner . . . .
- 12 C. assisting, as directed by Owner, with the refurbishment,  
13 maintenance and repair of the Vessel in conformity with good  
ship management practices . . . .
- 14 D. **employing officers, crew and other personnel for the Vessel,**  
15 **in Owner's name, on its behalf and as its authorized agent,**  
16 **with Manager authorized to employ, direct, supervise,**  
17 **train, discipline, terminate such personnel,** including  
negotiation and execution of articles and employment  
contracts. . . .
- 18 E. outfitting and provisioning the vessel. . .
- 19 F. managing, navigating and operating the Vessel at such times  
20 and in such places inside and outside of the United States as  
Owner from time to time directs. . .
- 21 G. establishing accounting systems and practices, and maintaining  
22 books and records for the Vessel, consistent with those  
generally accepted in the industry. . .
- 23 H. paying, when and as due, all fees, expenses and charges  
24 relating to the Vessel . . . .
- 25 I. assisting as directed by Owner with the leasing and/or  
chartering the Vessel . . . .

1 J. performing other matters in Owner's name, on its behalf and as  
2 its authorized agent, reasonably necessary to accomplish the  
3 foregoing items; and

4 K. upon request from Owner, assisting Owner with respect to any  
5 one or more of the duties allocated to Owner in section 7,  
6 below, and/or elsewhere in this agreement.

7 (VMA ¶ 5 (Dkt. No. 258-2 at 3–4) (emphasis added).)

8 **B. The VMA Role Assigned to DOQ**

9 Under the VMA, DOQ had the following duties:

10 **7. DUTIES OF OWNER**

11 Owner shall be responsible for the following items during the full term  
12 of this agreement:

13 A. funding the Vessel Account, as identified in Section 9, below, and  
14 otherwise sufficiently to pay for all Vessel costs and expenses . . . .

15 B. tendering the Vessel to Manager . . . .

16 C. employing officers, crew and other personnel for the Vessel . . . .

17 D. developing and granting final approval of all plans, designs and  
18 specifications, and timelines and budgets, for any refurbishment  
19 and/or repair work to the Vessel . . . .

20 E. responding to Manager's inquiries and requests within a reasonable  
21 amount of time . . . , and

22 F. all other matters relating to the Vessel and not allocated to Manager  
23 in this agreement.

24 (VMA ¶ 7 (Dkt. No. 258-2 at 4).)

25 **C. Compensation**

The Manager was to be compensated in three phases of the project: (1) for refurbishment  
and repair according to the VRRRA, which was designated as Exhibit 1 to the VMA; (2) for  
mobilization from France to the designated refurbishment location at 12% of actual cost; and (3)



1 for management of operation of the vessel at the completion of the refurbishment, at an annual  
2 fee of \$140,000. (*See* VMA ¶ 8 (Dkt. No. 258-2 at 5).)

3 A Vessel Account was to be opened at the Viking Bank in Seattle for use by SM, Inc., to  
4 pay third parties, with Owner to fund at opening a minimum of two months' operation, and to  
5 maintain a minimum of one month's operating expenses. (*Id.* ¶ 9.)

#### 6 **D. Refurbishment and Repair**

7 Section 21 of the VMA provides in pertinent part:

8  
9 **Owner shall be solely responsible for the preparation and final**  
10 **approval of all plans, designs and specifications, and timelines and**  
11 **budgets, for any refurbishment and/or repair work it wishes to**  
12 **have accomplished as to the Vessel, and for the engagement of all**  
13 **contractors and vendors necessary to complete such work.** In that  
14 regard, Owner has requested, and Manager has agreed, that Manager  
shall perform certain refurbishment and/or repair work, including  
assisting with the repair and preparation of the Vessel for its  
mobilization from France, refurbishment of the Vessel for its operation  
as a research vessel, and repair work arising while the Vessel is being  
managed by Manager during the term of this agreement.

15 **All refurbishment and repair work to be accomplished by Manager**  
16 **shall be performed pursuant to the terms and conditions set forth**  
17 **on Exhibit 1 hereto, entitled Vessel Refurbishment/Repair**  
18 **Agreement, and the Schedules attached thereto, both of which are**  
19 **incorporated into this agreement by reference. Owner shall be solely**  
20 **responsible for the preparation and final approval of all plans,**  
21 **designs and specifications, and timelines and budgets, for the**  
22 **specific refurbishment and/or repair work it wishes to have**  
23 **accomplished by Manager, which plans, designs and specifications, and**  
24 **timelines and budgets, shall be attached by Owner as "Schedules" to a**  
25 **Vessel Refurbishment/Repair Agreement upon the form attached as**  
**Exhibit 1 hereto. Manager may review and/or comment upon the**  
**Schedules provided by Owner, but no such review or comment**  
**shall increase Manager's responsibilities or liabilities.** Once Owner  
has finalized and approved the Schedules setting forth the plans,  
designs and specifications, and timelines and budgets, for the specific  
refurbishment and/or repair work to be accomplished by Manager,  
Owner shall sign a Vessel Refurbishment/Repair Agreement upon the

format attached as Exhibit 1 hereto as well as the Schedules thereto,  
and present both to Manager for its review and countersignature.

(VMA ¶ 21 (Dkt. No. 258-2 at 9) (emphasis added).)

**E. Choice of Law – Attorneys’ Fees**

Section 20 states that the VMA is governed by the general maritime law of the United States, or by the laws of the State of Washington in the event there is no applicable general maritime rule of law. In the event of any litigation, the substantially prevailing party is entitled to recover its attorneys’ fees and costs. (*Id.* ¶ 20.)

**F. Integration – The VRRRA**

Section 23 of the VMA incorporates the VRRRA as an exhibit to the VMA. However, the VRRRA narrows and more precisely defines the duties and liabilities of SM, Inc., relative to any repair or refurbishment of the vessel. Instead of the broad management role undertaken by SM, Inc., to operate the vessel under the VMA, SM, Inc., is given the responsibility to assist DOQ with project coordination, including DOQ’s development of design specifications, timelines and budgets, selection of contractors, hiring them in Owner’s name, and doing work as directed by DOQ. SM, Inc., was to pay contractors, vendors, and itself from the Vessel Account, and was to maintain books, consistent with those generally accepted in the industry. A Project Management Committee was to be established, with DOQ and its appointees to the Committee to be solely responsible for the design, timeline and budgets and for the selection, direction and control of vendors and contractors. DOQ was also given the responsibility to inspect the work, exercise quality control and coordinate with vendors to correct any deficiencies.

In the contract section dealing with defects in workmanship, DOQ agreed that SM, Inc., would have no liability for work performed or materials provided by contractors and vendors,

1 and that SM, Inc.'s liability for its own defective work be limited to \$50,000 in the aggregate.

2 The intent of the contract is clear: the owner was to assume the responsibility for the  
3 plans, budgets and schedules, for selection and control of the contractors and for inspection of  
4 the work. The parties intended that DOQ act as its own general contractor and that SM, Inc., act  
5 as a manager to assist in the refit project.

6 The VRRRA contains several important features that define the rights and liabilities of the  
7 parties:  
8

- 9 ♦ The "Basic Agreement" clause specifically states that DOQ is responsible for all  
10 plans, designs and specifications, and that DOQ "shall be solely responsible" for  
11 the parameters of the refurbishment/repair. (VRRRA ¶ 1 (Dkt. No. 258-3 at 2)  
(emphasis added).)
- 12 ♦ The same clause states that DOQ "shall be solely responsible for identifying  
13 overall parameters of the refurbishment/repair project, for developing and  
14 approving all plans, designs, specifications, timelines and budgets, and for  
15 approving and engaging all contractors and vendors as necessary to accomplish  
16 the project." (*Id.* (emphasis added).)
- 17 ♦ The full-time employees of the Manager were to be billed to DOQ at the rate  
18 listed on Exhibit A to the Agreement. All other SM, Inc., employees, and all  
19 contractors/vendors hired by SM, Inc., on owner's behalf were to be marked up at  
20 12%. (*Id.* ¶ 3.)
- 21 ♦ The "Owners Responsibilities" section repeats and emphasizes DOQ's duties  
22 under the VRRRA, including:
  - 23 A. establishing overall goal(s) and objective(s) for the project;
  - 24 C. engaging all contractors and vendors in its name, including Manager;
  - 25 D. developing and granting final approval of all plans, designs and  
specifications, and timelines and budgets, for all work it wishes to have  
performed, whether by Manager and/or other contractors and vendors;
  - G. participating in the Project Management Committee and appointing a  
Representative with authority to accept work, execute change orders and  
otherwise act on Owner's behalf . . . ;
  - H. carefully inspecting the vessel during and upon completion of the project

## FINDINGS OF FACT AND CONCLUSIONS

### OF LAW - 11

No. 2:06-cv-00183-JCC

1 and noting deficiencies in performance . . . . (*Id.* ¶ 4.)

- 2 ♦ In similar fashion, the “Manager Responsibilities” section clearly defines SM,  
3 Inc.’s duties, including:

4 B. assisting Owner with overall project coordination, including with respect to  
5 the development of plans, designs and specifications, and timelines and  
6 budgets, and the selection of other contractors and vendors, as requested by  
7 Owner and always subject to Owner’s final review and approval;

8 C. providing Owner with access to employees, contractors and vendors with  
9 whom Manager has existing relationships . . . ;

10 D. engaging, in Owner’s name, on its behalf and as its authorized agent, other  
11 contractors and vendors as directed by Owner or the Project Management  
12 Committee;

13 E. performing the specific work Owner wishes Manager itself to accomplish  
14 as identified on the Schedules attached hereto; and

15 F. paying all contractors and vendors, including itself, in Owner’s name, on  
16 Owner’s behalf and as Owner’s authorized agent, from the Vessel Account  
17 established pursuant to the Management Agreement. (*Id.* ¶ 5.)

- 18 ♦ The section outlining the Project Management Committee to be created provides  
19 that “Owner, including its appointee(s) to the [Committee] and Representative,  
20 shall be solely responsible for the development and final approval of plans,  
21 designs, specifications, timelines and budgets, and all changes thereto, which  
22 arise during the course of work, as well as for the selection, direction and control  
23 of all vendors and contractors, including Manager[.]” (*Id.* ¶ 6 (emphasis added).)

- 24 ♦ The VRRRA contains an exclusive warranty, covering only the repair/  
25 refurbishment work directly performed by SM, Inc. This warranty also limits SM,  
Inc.’s liability to “repair/replacement of the defective workmanship and/or  
materials and to \$50,000 in the aggregate or an amount equal to Manager’s twelve  
percent (12%) compensation with respect thereto, whichever is less.” (*Id.* ¶ 10.)

- ♦ The VRRRA also provides that “[i]n no event shall Manager be responsible for  
any incidental, special or consequential damages whatsoever, even if the  
possibility of such may have been or was foreseeable.” (*Id.* ¶ 11.)

18. DOQ clearly understood through McDowell that it was doing business with SM,  
Inc., and not with Stabbert Maritime Holdings, LLC; Stabbert Maritime, LLC; Stabbert Yacht &

1 Ship, LLC; or Stabbert Yacht & Ship Holding, LLC. DOQ was aware that Ocean Services  
2 assisted in procuring documentation for the Atlantic Ocean transit. To the extent that Ocean  
3 Services assisted in the facilitation of work in Gulfport, was relied upon for credit by vendors,  
4 due to its reputation in the industry, or was delegated certain tasks, those actions benefited DOQ.  
5 There was no evidence of fraud on DOQ or any injustice or disregard of corporate formalities  
6 with respect to any of the affiliated Stabbert Defendants.

7  
8 19. Work on the Vessel refit commenced in Gulfport, Mississippi, in January 2005  
9 and DOQ appointed Patrick Lahey as its Owner's Representative under the VRRRA. The work  
10 performed in Gulfport was regarded as Phase I of the project. Lahey as Owner's Representative  
11 was on site only one-third of the time during Phase I.

12 20. McDowell has contended that a Project Management Committee was never  
13 appointed. McDowell became the principal point of contact for DOQ and was significantly  
14 involved with planning and details of the project. McDowell generated hundreds of emails to  
15 SM, Inc., to Rick Board as project manager, and to Kirilloff, the project naval architect. DOQ did  
16 not intend to delegate its contractual responsibilities to SM, Inc. in any significant way.

17 21. At the direction of DOQ, the scope of the project changed and increased  
18 substantially beginning in Phase I. These changes came from a number of representatives of  
19 DOQ, including McDowell, Carlos DePaco, Gallo, and Erica Knie, who was Schmidheiny's  
20 partner. These directions were sometimes conflicting and significantly impacted design,  
21 scheduling and management in an adverse way.

22  
23 22. The contract was modified in only one respect. SM, Inc., agreed to cap its 12%  
24 mark-up during the summer of 2005 when the project had already grown well beyond initial  
25 planning. There was no other amendment of modification of the contract that in any way

1 lessened DOQ's responsibilities or increased those of SM, Inc. To the extent SM, Inc., attempted  
2 to assist DOQ in oversight, it did so without assuming further responsibility pursuant to VMA  
3 ¶ 4.

4 23. The contractual responsibilities of DOQ to provide inspection of work, design and  
5 scheduling were never waived by SM, Inc. Further, there was no waiver of the limitations of  
6 liability in the VRRRA. At no time did SM, Inc., manifest an intent to relinquish a known right.

7 24. DOLLC engaged Offshore-Inland Services of Alabama, Inc., as a steel contractor  
8 to work on the vessel by issuing purchase orders in its name. Offshore-Inland had dealt with  
9 Ocean Services in the past and later contended erroneously that its agreement was with Ocean  
10 Services. Ocean Services was not engaged as a general contractor for any work on the vessel.  
11 Some of the steel work done by Offshore-Inland was deficient and Stabbert reasonably withheld  
12 \$50,000 of Offshore-Inland's fees to cover this deficiency. Stabbert notified Offshore-Inland of  
13 these deficiencies and Offshore-Inland offered to provide credits. It is probable that Offshore-  
14 Inland would have fixed the deficient work had it been asked to do so and the failure of DOQ to  
15 have an on-site owner's representative on site likely contributed to this deficiency claim. In any  
16 event, neither SM, Inc., nor Ocean Services were negligent or breached any contracted duty in  
17 regard to work performed by Offshore-Inland.  
18

19 25. The summer weather in 2005 at Gulfport was exceptionally severe, culminating in  
20 Hurricane Katrina on August 28. The hurricane had a devastating impact on the project and  
21 caused substantial damage to the vessel. SM, Inc., and DOQ entered into an agreement by the  
22 terms of which SM, Inc., would administer an insurance claim for hurricane damage in exchange  
23 for a 20% fee as a mark-up on such items as underwriters approved. SM, Inc., performed its  
24 services under this agreement and as of the date of trial, underwriters had approved and paid fees  
25

1 for SM, Inc., in the amount of \$483,518.40 into an escrow account held by FIS Marine, the  
2 insurance broker. DOQ blocked disbursement from this account in favor of SM, Inc., and the  
3 parties ultimately agreed that \$1.2 million remain in the escrow account pending further order of  
4 the Court. (Dkt. 89.) DOQ has produced no credible evidence that shows why SM, Inc., should  
5 not be entitled to payment from the escrow, including any evidence to support DOQ's contention  
6 of unclean hands.

7  
8 26. After Hurricane Katrina, the vessel was towed to Seattle for completion of the  
9 work in what the parties regarded as Phase II of the project. DOQ recognized that it needed more  
10 thorough quality inspection and appointed Carlos DePaco in January 2006 to serve in that  
11 capacity. Shortly thereafter, DOQ recognized that DePaco was not technically qualified to  
12 perform as such and then appointed Boris Kirilloff for quality control. Kirilloff, who was still the  
13 project naval architect and somewhat overworked, in turn suggested that Aaron "Joe" Smith be  
14 so appointed. Smith did assume that role but was unable to be on site full-time. Finally, in April  
15 4, 2006, Kirilloff recognized that the quality inspection was still lacking and suggested that  
16 Stabbert be asked to fill that role. However, Stabbert was never asked to do so. The quality  
17 inspection remained a responsibility of DOQ and DOQ's efforts in that regard were inadequate  
18 throughout the project.

19  
20 27. On January 1, 2006, SM, Inc., reorganized and formed Stabbert Maritime Yacht  
21 & Ship, LLC ("SM, LLC") for tax reasons and changed its name to SMY&S, Inc. It delegated  
22 performance under the VMA and VRRRA to SM, LLC, which continued to use the trade name  
23 Venture Pacific Marine. SM, LLC, is the successor company to SM, Inc.

1           28.     The project expansion and conflicting directions from DOQ continued in Phase II.  
2 Many of the vessel's features and much of its equipment were significantly upgraded after the  
3 hurricane damage. By the end of May 2006, DOQ had spent \$13,189,679 on the vessel.

4           29.     DOQ had fundamentally changed its goal from a limited refurbishment of a  
5 commercial-class dive support vessel to the transformation of the Vessel into a research vessel  
6 with well-appointed yacht-style accommodations that required design changes and the addition  
7 of modern and high-tech features throughout. Examples include a major change in crew quarters,  
8 dynamic positioning, removal of controllable pitch propellers, new main engines, new generator  
9 ends, new switchboard, addition of a new sophisticated Reson 8111 multi-beam sonar, doubling  
10 the air conditioning and an extensive audio visual system.

11           30.     SM, Inc., complained to DOQ about the lack of an on-site owner's representative  
12 and about the conflicting instructions it was receiving. Finally, Stabbert wrote to Schmidheiny  
13 and Knie on April 20, 2006, and pointed out the costly changes, lack of owner support, and  
14 increased level of specifications that had led to significant problems. Stabbert suggested that (1)  
15 the issues be solved; (2) SM, Inc., terminate as manager; or (3) the vessel be sold.

16           31.     DOQ accepted SM, Inc.'s suggestion to terminate the VMA and VRRRA and the  
17 contract was terminated effective April 27, 2006.

18           32.     Following termination of the contract, DOQ attempted completion of the project  
19 in what it designated as Phase III. Joe Smith was appointed as project manager for Phase III.  
20 The cost of the project continued to escalate and by the time of trial McDowell contended DOQ  
21 had spent \$28 million on the vessel and that it was worth \$42 million.

22           33.     On August 8, 2006, DOQ filed this action claiming breach of contract, breach of  
23 express warranty, negligence, implied warranty and for an accounting. Ultimately, DOQ made  
24  
25



1 fifty-eight separate claims of alleged deficient work on the vessel, which it contended were  
2 caused by Defendants' breach of a legal duty. This Court dismissed certain claims in its order  
3 granting in part and denying in part Defendants' motion for summary judgment. (Dkt. 87.)  
4 Thereafter, this Court excluded certain claims presented by DOQ on grounds of late disclosure.  
5 (Dkt. 174.) DOQ dropped several claims prior to trial and ultimately thirty-nine claims for  
6 alleged deficient work remained for trial. No proof was adduced as to eight of these. (*See*  
7 Appendix A to Defendant's Closing Argument (Dkt. No. 332).)

8  
9 34. On December 20, 2006, Schmidheiny withdrew his Fairmont Company as a  
10 shareholder in DOQ and requested of McDowell that Fairmont representatives not be involved in  
11 the litigation.

12 35. On March 7, 2007, DOQ transferred the vessel to its remaining shareholder Deep  
13 Ocean Expeditions, LLC ("DOE").

14 36. On May 28, 2008, DOE filed a petition in bankruptcy in this District seeking  
15 reorganization.

## 16 CONCLUSIONS OF LAW

17 1. The Court incorporates by reference its decision dated April 21, 2009 (Dkt. No.  
18 333), as part of these Findings of Fact and Conclusions of Law.

19 2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1332, 1333 and 1367(a).

20 3. The contract, the VMA and the VRRRA, constitutes a maritime contract within the  
21 meaning of Rule 9(h).

22 4. The VMA and VRRRA are enforceable according to their terms. The contract  
23 placed the responsibility on DOQ to inspect the work, and to have sole responsibility for the  
24 preparation of design, specifications, timelines and budgets.  
25

## FINDINGS OF FACT AND CONCLUSIONS OF LAW - 17

1           5.       The contract insulated SM, Inc., from any liability for deficient work performed  
2 by third parties. The contract also prohibited any claim for consequential damages.

3           6.       DOQ failed to prove SM, Inc., or its delegatee SM,LLC, breached any duty under  
4 the contract and failed to prove that SM, Inc., did not carry out its management responsibilities  
5 with reasonable care.

6           7.       DOQ failed to prove by a preponderance of the evidence that SM, Inc., or its  
7 delegatee SM, LLC, breached any duty of reasonable care as a Manager under the Contract or  
8 that any Defendant caused a deficiency. The principal witness in support of DOQ's contentions  
9 of deficiencies was Aaron "Joe" Smith, whose testimony the Court finds was not entirely  
10 credible.  
11

12           8.       The claimed deficiencies:

13                   (1) Resulted from unknown causes; or

14                   (2) Were incomplete work; or

15                   (3) Were upgrades to the mission of the vessel; or

16                   (4) Were solely the result of DOQ's own failure to carry out its contract  
17 responsibilities including inspection; or

18                   (5) Were not deficiencies at all; or

19                   (6) Were defective work of a third party not attributable to management.

20           In some instances, DOQ unreasonably declined to request a correction in work by a  
21 contractor or rejected an offer by the contractor to repair the defect. There was no evidence that  
22 SM, Inc. performed any defective work. (*See* Appendix B to Defendants' closing argument (Dkt.  
23 327).)

1           9.       SM, Inc., supplied adequate accounting to DOQ during the project in full  
2 compliance with the VMA. DOQ introduced no evidence to the contrary.

3           10.     SM, Inc., failed to adduce adequate proof to show it is entitled to compensation  
4 for hurricane repair work beyond the 20% mark-up for items approved by insurance, or for  
5 remaining work under the VRRRA.

6           11.     SM, Inc., reasonably incurred legal defense costs of \$78,000 in defending against  
7 Offshore-Inland in a project-related lawsuit brought against its affiliate Ocean Services, which  
8 had been reasonably delegated a task to assist DOQ. This was a claim arising out of and relating  
9 to the vessel project and the Contract even though Offshore-Inland incorrectly named Ocean  
10 Services as a defendant.

11           12.     In only two instances does DOQ contend that SM, Inc., as agent, failed to contract  
12 in DOQ's name: the Offshore-Inland suit and the Excel contract for insulation work. The  
13 purchase orders, however, in both instances were issued in DOLLC's name. Moreover, DOQ can  
14 demonstrate no harm arising out of either instance.

15           13.     DOQ failed to present sufficient evidence to allow a reasonable fact finder to hold  
16 Dan Stabbert or his marital community liable to DOQ under the Contract or any other theory.

17           14.     The Court finds SM, Inc., to be the substantially prevailing party.

18           15.     There is no tort remedy in maritime law for purely economic loss stemming from  
19 negligent performance of contract for professional services where those services are related to  
20 the repair of a vessel. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858,  
21 871–72 (1986) (stating that “damage to the product itself is most naturally understood as a  
22 warranty claim”); *Employers Ins. of Wasau v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752, 755  
23 (5th Cr. 1989) (holding that “the economic loss rule adopted in the *East River* case precludes  
24  
25

1 recovery in maritime tort for purely economic loss stemming from the negligent performance of  
2 a contract for professional services where those services are rendered as part of the construction  
3 of a vessel”); *Nathaniel Shipping, Inc. v. Gen. Elec. Co., Inc.*, 932 F.2d 366, 368 n.3 (5th Cir.  
4 1991) (declining to find a distinction between services for the manufacture of a new vessel and  
5 services related to the repair of an existing vessel). Washington law is in accord. *Alejandro v.*  
6 *Bull*, 153 P.3d 864, 867 (Wash. 2007) (explaining that the “economic loss rule applies to hold  
7 parties to their contract remedies when a loss potentially implicates both tort and contract  
8 relief”).

10 16. Neither SM, Inc., nor Ocean Services acted as general contractors with respect to  
11 the vessel refit; neither entity breached any legal duty, express or implied, owing to DOQ.

12 17. SM, Inc., did not waive any contract responsibilities assigned to DOQ. SM, Inc.,  
13 and DOQ never modified the duties assigned to the parties under the Contract.

14 18. DOQ failed to establish that any Defendant entity used its alter ego to perpetuate a  
15 fraud or injustice or other exceptional circumstances to pierce the corporate veil. *See Chan v.*  
16 *Soc’y Expeditions, Inc.*, 123 F.3d 1287, 1294 (9th Cir. 1997). DOQ also failed to establish any  
17 basis for the personal liability of Dan or Cheryl Stabbert or their marital community.

18 19. SM, Inc., performed its contract for administration of the insurance claim and  
19 DOQ failed to establish any legal right to block payment to SM, Inc., from the FIS broker’s  
20 account.

22 20. SM, Inc., is entitled to indemnity for its reasonable expenses in defending the  
23 *Offshore-Inland* lawsuit to the extent of \$40,000.00 as permitted by the order of dismissal  
24 entered on December 23, 2008. (Dkt. 248.)

25 21. Defendants are entitled to entry of a judgment dismissing all claims against them

## **FINDINGS OF FACT AND CONCLUSIONS**

### **OF LAW - 20**

No. 2:06-cv-00183-JCC

1 with prejudice together with costs.

2 22. SM, Inc., failed to establish a right to recover unpaid amounts of insurance  
3 proceeds beyond the 20% approved by underwriters or that it was entitled to recover unpaid  
4 billings for repair and refurbishment.

5 23. SM, Inc., is entitled to an order that DOQ pay from the insurance fund the amount  
6 approved by underwriters for the 20% markup for SM, Inc., within 30 days of the finalization of  
7 the insurance claim together with any accrued interest earned on that amount.

8 24. SM, Inc., is the substantially prevailing party under the contract and entitled to a  
9 judgment against DOQ for the reasonable legal fees incurred in this litigation. The Court's  
10 detailed decision on the fee petition is contained in a separate order issued today.

11 25. The Orders of this Court dated October 2, 2007 (Dkt. 87), November 29, 2007  
12 (Dkt. 125), March 17, 2008 (Dkt. 174), and April 21, 2009 (Dkt. 333) are incorporated by  
13 reference herein to the extent not modified by these conclusions of law.  
14

15 DATED this 18th day of June, 2009.

16  
17  
18  
19   
20 John C. Coughenour  
21 UNITED STATES DISTRICT JUDGE  
22  
23  
24  
25